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U.S. Department of Justice

Federal Bureau of Investigation

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

CALEA Implementation Section
Suite 300
14800 Conference Center Drive
Chantilly, VA 20151

May 7, 1999

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street, S.W., Room TW-A325
Washington, D.C. 20554

EX PARTE SUBMISSION

Re: Ex Parte Submission
In the Matter Of: Communications Assistance for Law Enforcement Act
CC Docket No. 97-213

Dear Ms. Salas:

On May 7, 1999, the Federal Bureau of Investigation delivered the attached letter to Mr. Thomas Sugrue, Bureau Chief of the Wireless Telecommunications Bureau. A copy of the letter was also delivered to the Federal Communications Commission (FCC) Commissioners, as well as the following FCC staff members: Dale Hatfield, Julius Knapp, Susan Aaron, Diane Conley, James F. Green, David Krech, Charlene Lagerwerff, Rodney Small, and Tom Wasilewski.

Pursuant to § 1.1206 of the Commission's Rules, 47 C.F.R. § 1.1206, enclosed please find an original and two copies of the letter. If you have any questions concerning this submission, please contact me at (703) 814-4840.

Sincerely,

Michael Gallagher

Michael Gallagher
Program Analyst
Federal Bureau of Investigation

Enclosure

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BY HAND DELIVERY

Mr. Thomas J. Sugrue
Bureau Chief, Wireless Telecommunications Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: **In the Matter Of: Communications Assistance for Law Enforcement Act**
CC Docket No. 97-213 — Systems Security And Integrity Regulations

Dear Mr. Sugrue:

On March 15, 1999, the Commission released a Report and Order (SSI Order) establishing "systems security and integrity" regulations implementing § 105 of the Communications Assistance for Law Enforcement Act (CALEA), 47 U.S.C. § 1004. The Federal Bureau of Investigation (the FBI), in consultation with the Department of Justice, commends the Commission for its work in drafting this order. However, the FBI shares certain concerns regarding the order that have been set forth in the ex parte letters recently filed with the Commission by the Cellular Telecommunications Industry Association (CTIA) and AirTouch Communications, Inc. See CTIA March 29, 1999 Letter to Julius P. Knapp; AirTouch Communications, Inc. April 6, 1999 Letter to Thomas Sugrue.

The regulations promulgated by the SSI Order require carriers to maintain records of "call-identifying information and unauthorized interceptions (including the content of the unauthorized interception) for ten years" and "the content of each authorized interception of communications for a reasonable period of time." SSI Order Appendix A § 64.2104(b); see also *id.* ¶¶ 50-51. The FBI believes that these requirements are not mandated by § 105 and that, in some respects, compliance with these requirements could cause a carrier to violate federal electronic surveillance laws.

Under CALEA, a carrier's role is to "*enabl[e] the government*" to "intercept * * * wire and electronic communications" and to "access call-identifying information" pursuant to court orders or other lawful authorization. 47 U.S.C. § 1002(a)(1)-(2) (emphasis added);

see also 18 U.S.C. § 2511(2)(a)(ii). It is the government, not the carrier, that intercepts the communications and accesses the call-identifying information. This allocation of responsibility is consistent with the federal laws governing electronic surveillance, such as Title III of the Omnibus Crime Control and Safe Streets Act of 1968 and the Electronic Communications Privacy Act of 1986, which generally provide for law enforcement agencies — not telecommunications carriers — to engage in authorized electronic surveillance. See, *e.g.*, 18 U.S.C. §§ 2518, 3123. The interception of communications by persons with no legal authorization to do so may subject these persons to criminal penalties (see 18 U.S.C. § 2511(1)(a)) and civil liability (18 U.S.C. § 2520(a)). Naturally, the impropriety of unauthorized persons recording intercepted communications is especially severe when the interception itself is unauthorized.

Neither Section 105 of CALEA, nor the implementing provisions set forth in Section 301 of CALEA (codified at 47 U.S.C. § 229), require carriers to collect this information. The reference in Section 301 to a carrier's obligation to "maintain secure and accurate records of any interception or access with or without * * * authorization" requires carriers to maintain records *of* interceptions, rather than records of information collected *through* interceptions — *i.e.*, it obligates carriers to record the sort of information set forth in § 64.2104(a) of the regulations promulgated by the SSI Order. Although the records properly may include such information as telephone numbers and circuit identification numbers, see SSI Order Appendix A § 64.2104(a)(1)(i), this represents information used to implement the interception, rather than information collected in the course of the interception.

The FBI therefore respectfully suggests that the Commission modify this portion of the regulations and the corresponding portions of the Report and Order to eliminate any requirement that carriers maintain records of the information collected through electronic surveillance. Specifically, the FBI suggests that § 64.2104(b) of these regulations (and the corresponding portions of the Report and Order) should be modified so that the specification of the time periods for the retention of records is made applicable solely to the "record[s] of each interception" described in § 64.2104(a), and not the information currently specified in § 64.2104(b)(1) and (b)(2).

Very truly yours,

A handwritten signature in cursive script, reading "H. Michael Warren" followed by a stylized flourish.

H. Michael Warren
Chief, CALEA Implementation Section
Federal Bureau of Investigation

cc: Chairman William Kennard, Commissioner Harold Furchtgott-Roth, Commissioner Michael Powell, Commissioner Susan Ness, Commissioner Gloria Tristani, Magalie Salas, Dale Hatfield, Julius Knapp, Susan Aaron, Diane Conley, James F. Green, David Krech, Charlene Lagerwerff, Rodney Small, Tom Wasilewski